UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v. 23 Cr. 00490 (SHS)

ROBERT MENENDEZ, et al.

Conference

Defendants.

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New York, N.Y.
May 6, 2024
11:00 a.m.

Before:

HON. SIDNEY H. STEIN,

U.S. District Judge

APPEARANCES

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Southern District of New York
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APPEARANCES, Continued:

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SETH H. AGATA
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Attorneys for Defendant Fred Daibes.

(Case called.)

THE DEPUTY CLERK: All counsel please state your names for the record.

MR. MONTELEONI: Good morning, your Honor. Paul Monteleoni for the government. With me at counsel table are my colleagues Dan Richenthal, Eli Mark, Lara Pomerantz, as well as Christina Clark, a trial attorney from the National Security Division of the Department of Justice.

THE COURT: Good morning.

MR. FEE: Good morning, your Honor. For Senator Menendez, Adam Fee and Avi Weitzman to my left.

Your Honor, we have conferred with the defendant, and he has agreed to waive his appearance. We have discussed everything that may happen in morning, and he's comfortable with that.

THE COURT: Good morning.

MR. LUSTBERG: Good morning, your Honor. Laurence S. Lustberg from Gibbons, PC, on behalf of Wael Hana. With me at counsel table are my partners, Ricardo Solano and Anne Collart.

We also have consulted with your client, who knowingly and voluntarily waived his appearance today.

THE COURT: Good morning. I accept the waivers from both of your clients.

MR. DE CASTRO: Good morning, your Honor. Cesar De Castro, Seth Agata and Shannon McMahon for Fred Daibes, who

also waived his appearance today, and we have discussed it with him.

THE COURT: I accept that waiver.

Please be seated.

We have a full agenda. Let me begin with the in limines and I'll go in order according to the ECF filings. I have views and conclusions on many of them, but I'll hear argument on a few.

First let's do ECF 291, which is the government's motions to preclude certain evidence. Item number one is uncontested, so it's dismissed as moot. That's seeking a preclusion of evidence that the charges are vindictive, selective, politically motivated or brought for improper purposes.

The second one is seeking preclusion that the Senator's conduct should have been handled other than through criminal prosecution, that the prosecution would have negative consequences. That's largely uncontested. He's not going to argue that the conduct should have been handled in some other way, but there's one aspect of that I want to discuss with the parties and that's whether evidence should be permitted on whether he was warned by the government about the actions of the Egyptian authorities trying to make him aware or actions leading to his being an agent, however you want to phrase it.

The argument it seems to me for allowing it is that it

goes to his scienter. Sort of a weak argument, but I see it theoretically. That is, because he wasn't warned, he didn't realize that he was becoming an agent or at risk of being an agent or was an agent, and the argument on the other side is to relevance -- there's clearly no duty of the authorities to warn somebody that the Egyptian authorities were taking steps to make him an agent.

So I see it both ways, but let's hear argument. It's the government's motion.

MR. RICHENTHAL: Your Honor, our view I think is pretty simple. If the defense wishes to argue, for example, in summation, that the jury has heard no evidence that Mr. Menendez was warned that what he was doing was illegal and, therefore, the jury should conclude that we haven't met our burden, I don't expect we would object, but that's very different from seeking to elicit affirmatively that, for example, the Federal Bureau of Investigation in theory could have warned him and chose not to, because that evidence doesn't go to our lack of proof, or alleged lack of proof. That evidence can only be reasonably understood by a lay jury as a suggestion that the FBI, or the DOJ more generally, should have warned him, and that gets into charging policies, that gets into counter-intelligence matters, that has no relevance in our judgment. But even if it had a modicum of relevance, it would turn this trial, which is about the defendant's guilt, into

something else, the choice by the government that he's here instead of warned off of the conduct. Under Rule 403, that simply should not be permitted.

THE COURT: All right. Mr. Fee or Mr. Weitzman.

MR. FEE: Your Honor, that was the argument presented in the papers. I won't repeat the other side of it. But this is an argument case. The government's case relies on inference. The Court characterized it as weak. I think it is an argument that the jury could be persuaded by, of course it's not at the core, that the Senator did not know, did not have any belief that what he was doing was wrong --

THE COURT: Well, you can argue that.

MR. FEE: We will argue that, but, your Honor, we are thinking of a very -- a question or two or three to an FBI agent eliciting the fact that they did not attempt to warn Senator Menendez at any point that they believed he was engaging with foreign intelligence agents. And, your Honor, the government's proof, the chronology of it is going to have the FBI encountering sources who are dealing with people the government says are Egyptian foreign agents.

THE COURT: I understand that, but the jury should not be led to believe or should not have evidence on the basis of which it could conclude that the government had an affirmative obligation here.

MR. FEE: Your Honor, we are not going to make that

argument. The jury is told all the time to consider arguments as they are expressed and not for any other proper purpose. We are not going to make the argument that they had an obligation to warn him. We are going to -- we would like to argue and think the jury should hear the argument that it suggests, the Governor -- the Senator had no warning and no intention to do anything that would violate the law.

MR. RICHENTHAL: I'm happy to respond further.

THE COURT: Go ahead.

MR. RICHENTHAL: Again, the jury will know he wasn't warned because there will be no evidence of a warning. What we're talking about here is whether an agent should be cross-examined --

THE COURT: I understand. I'm going to exclude it. The argument can be made that, jury, you've heard no evidence that there was any warning. I think to have questioning of agents as to why they -- that they didn't allow the jury to draw the inference that they should have, I think that the probative value is very low, and it's substantially outweighed by danger of confusing the issues and misreading the jury. So I'm going to exclude that under 403 ruling.

All right, the third motion by the government is evidence of, punishment should be precluded. I'm not sure why the government even made that motion, but of course the defendants don't object. It's uncontested. So that's

dismissed as moot. There will be no evidence in this trial of punishment. That's solely for the Court, and all the parties know that.

The fourth motion is to preclude evidence regarding the Senator's prior federal criminal case. Everyone agrees, absent his testifying, that it's not going to come in. It's a different issue if and when he decides to take the stand, if he does. So right now I'll dismiss that as moot.

The fifth motion is to preclude evidence regarding whether the government has met its discovery obligations. Again, I'm not quite sure why the government bothered to make that. There's no opposition to it. I certainly wouldn't allow any such argument. So that's dismissed as moot.

Sixth is preclusion whether the government has -- of evidence of whether the government has brought unrelated cases. That's not contested, also dismissed as moot.

The seventh is evidence or argument to preclude evidence or argument regarding whether the charges are vague. Once again, I don't know what the government brought that argument -- what he can argue is that it's a legal issue, it's not for argument, and that's already been raised in the prior motions here, so I'm dismissing that as moot.

Number eight is to preclude evidence or argument whether others engaged in similar conduct. The Senator wants to show that senators often meet with foreign officials, join

on position papers, and advocate for laws. I mean, I have no objection to that. If that's where it goes, I mean, that's fine. I don't think there's any argument here.

Sir.

MR. RICHENTHAL: So I think I would phrase it that the line here may be more dotted than solid, but here's where we see the line. Between the types of things your Honor just mentioned of which Senator Menendez had contemporaneous knowledge and the types of things your Honor just mentioned of which he --

THE COURT: Wait. Wait. Wait. You're saying he knows that Senator so and so and Senator so and so joined with him on this resolution, or he joined with Senator so and so and so and so on this resolution? Is that what you're saying?

MR. RICHENTHAL: Exactly.

THE COURT: That's not an issue.

MR. RICHENTHAL: Agreed. That's perfectly admissible. That's our point. Our concern based on some of the statements in prior papers by the defendant is that -- and, frankly, also based on page seven of their brief in opposition to our motion in limine is that they may intend to introduce evidence about the actions of other senators of which the defendant had no contemporaneous knowledge at all, in which case our view is it's irrelevant and confusing to the jury.

In other words, in hindsight, perhaps based on

discovery, they've learned that other people did similar things. Well, that's not relevant to an issue in front of the jury. For the jury, the jury should know what the defendant knew at the time, and that may include trips he went on with other people, it may include conduct engaged in by other people, but it shouldn't be conduct engaged in by other people of which he had no knowledge at the time he engaged in the charged conduct.

THE COURT: Well, how is that line drawn?

MR. RICHENTHAL: I think, your Honor, can police it in realtime, but let me just give you an example. Let's assume for the sake of argument the defendant either on direct or cross-examination, that is either his case or our case, would like to put in information about a trip that Mr. Menendez was on or contemporaneously aware of. That would seem to go to his mental state, at least in theory.

But let's assume something else. Let's assume on cross-examination, for example, the defendant's staff -- or the defendant's lawyers try to put in evidence of a trip that the defendant had no knowledge of, maybe even was years earlier or years later. At the point we would say there's no connection with defendant's contemporaneous mental state.

THE COURT: I understand.

Mr. Fee.

MR. FEE: Your Honor, I'm not sure what the government

is envisioning. I will say this. If the government is arguing an inference, like they will hear that the fact that an intelligence individual met with Senator Menendez on this trip, it is perfectly appropriate to offer evidence through a staffer, through an ambassador, through another Senator that they regularly meet with intelligence officials on these exact same sort of trips --

THE COURT: That's not an issue. Go ahead.

MR. FEE: If you mean that's not an issue, you're okay with that, your Honor, I think we're done.

THE COURT: All right.

MR. FEE: Your Honor, I have one issue about one of the moot motions.

THE COURT: Yes.

MR. FEE: It's government's motion four, the prior criminal prosecution.

THE COURT: Yes.

MR. FEE: We raised it in our papers. I do think it's important for the Senator to understand that he considers his testimony --

THE COURT: It's not -- I'm sorry.

MR. FEE: No. Please go ahead, your Honor.

THE COURT: I shouldn't interrupt you.

MR. FEE: No. No.

THE COURT: Go ahead, please.

MR. FEE: I think maybe you were about to say, the government -- it's a semantic difference. In their motion they said they might inquire about it if he chooses to testify. That's not okay. If he opens the door and he does testify and talks about it, obviously they can inquire about it. But the first thing, we want to make sure the government is not taking that position, that the fact that the Senator is taking the stand somehow opens the door in and of itself.

THE COURT: I don't think it's something we have to worry about at this point. It's highly premature.

MR. FEE: Thank you, your Honor.

MR. RICHENTHAL: Can I go back briefly to the other Senator's point?

THE COURT: Yes.

MR. RICHENTHAL: Again, I may be taking too liberally what's written on page seven of their brief, but they write "the defendant intends only to argue he lacked criminal intent and evidence that many other senators lawfully took the same actions as Senator Menendez meeting with foreign governments in the matter advocating for the same position the foreign government urged may make inference of no criminal intent more plausible."

That sentence is devoid of any connection in date or otherwise to the defendant's contemporaneous knowledge. That's exactly the point I'm trying to make. It may be your Honor

can't rule in advance, but we think there is a line here between the evidence of which he had current knowledge, knowledge of the time he acted, and evidence of which he did not. And we think that the general inquiry of whether senators at some point unbeknownst to him --

THE COURT: Understood, and you have attuned me to that difference. Thank you. I don't think there's any need for a ruling at this point.

All right. Nine, government seeks to preclude evidence as to whether the charged acts were good for the public. I'm not quite sure what that argument is. It seems to me the Senator should be able to adduce from however he's going to adduce it that one of the reasons he was doing things was he thought it was in the public interest.

Does the government have any objection to that?

MR. RICHENTHAL: No. I agree 100 percent with what your Honor just said. Our concern is the similar concern we raised a minute ago, that devoid of his contemporaneous intent, the defendant may argue that, in hindsight, the actions were allegedly good for the United States or not harmful for the United States.

THE COURT: Again, I can't rule in the abstract. I understand that position.

Mr. Fee, I assume there's no issue here.

MR. FEE: All good, your Honor.

THE COURT: All right. Ten, the government requests a preclusion of defendant's prior good acts to show propensity to not commit crimes. I mean that, just the way it's phrased, answers the question. I think everyone agrees the Senator can introduce evidence of his record as Senator on relevant issues. He's going to. That's part and parcel of what the trial is about.

In regard to Mr. Daibes, he argues he wants to put in the fact that he's a habitual gift giver. It seems to me that can come in. However -- I mean, if it's admissible, I don't have any objection to that. I assume the government doesn't either. That's my ruling there.

MR. RICHENTHAL: I agree with everything your Honor just said. I would just note, I think this is something I keep saying, your Honor used the word "relevant" in describing the prior good acts. We agree, not all acts would be relevant to these charges. Acts towards Egypt, for example, probably are. Acts unrelated to Egypt or Qatar probably are not. That was exactly our concern.

THE COURT: Okay. 401, irrelevant evidence does not come in.

All right. Eleven, the government seeks to preclude evidence of the defendants' -- all of the defendants' family background, age, health or other personal characteristics. Highly premature. There's no need for me to rule on that now.

If and when someone takes the stand, we'll see. That is ECF 291.

Let's turn to ECF 290. Menendez's motion to preclude speculative evidence and testimony. First motion there is the Senator seeks to preclude speculative testimony regarding items of value seized from the Menendez home. Apparently, Mr. Menendez says that the -- he concedes that the evidence of the gold and the specific money that has allegedly fingerprint or DNA evidence tying it to these defendants can come in, but the cash or I think there may be a gold bar, I'm not sure, of the 11 where there's no -- that they can't track the number on the bar to Daibes or Hana, that shouldn't come in. That doesn't make sense here.

The cash and gold bars found in the Menendez house, all of it is admissible here. All the cash and the gold was all stashed in the same way -- standard is the wrong word, was kept in the same manner. It was kept throughout the house in similar fashion, stuffed in pockets, in a safe, in jackets, and apparently some of the money was withdrawn $10,000 at a time from -- $10,000 at a time.

It's a permissible inference that all the money and the gold was part of the alleged scheme. The defendants will have an argument, should they choose to make it, that goes to the weight of that evidence in regard to the gold and the cash that doesn't have its fingerprints or DNA on it, that is of

Daibes or Hana or Daibes' driver. It goes to the weight, not the admissibility. I do find that the probative value substantially outweighs any prejudice here and I am allowing it in.

The second motion by Menendez is to preclude evidence regarding high end watches. I must say that I originally was thinking that if all we had was the text, how about one of these, that makes sense to preclude it as overly speculative. I have no idea -- I would have had no idea about what "one of these" means. But the government has proffered in its papers that that message itself, how about one of these, with pictures of high end watches, paragraph 58 in the indictment, the government has proffered that it was sent via an encrypted app and sent two days before Daibes sent Menendez a link tracking a Menendez resolution that supported Qatar and shortly after a dinner with the Qatari officials and immediately before Daibes gave Menendez a one carat kilogram gold bar.

On the basis of that good faith proffer, I am allowing that evidence. The probative value is not outweighed by a danger of unfair prejudice. It's highly probative, and there's very little danger of unfair prejudice or confusing the issues. So under 403, I am allowing that evidence in. I'm not precluding the evidence of the high end watches.

MR. FEE: Your Honor.

THE COURT: Sure.

MR. FEE: I hear the ruling and have nothing further to say about that. It spurs one additional issue in my mind I did want to flag just to perhaps promote economy at the trial. The government has begun to use the phrase "encrypted messaging app" regularly. I fear we're going to hear it in the opening and in argument. I will make the point that all messaging apps these days are encrypted, and if the government does that, I do feel we would be obliged to ask witnesses on the stand if they use these same apps. But there is essentially no messaging that is not encrypted.

So I think the Court should be aware if they're permitted to make that point and make that argument, the defense will be required to meet it to some degree.

THE COURT: Yes, sir. Go ahead.

MR. RICHENTHAL: I'm not sure it's technically true they're all equally encrypted, but that aside --

THE COURT: I must say I don't know.

MR. RICHENTHAL: But that aside, whether an individual human being, lay witness uses an app is plainly not appropriate to be crossing the witness. If the defense wants to elicit testimony, for example, from a technical expert, of which we're calling one, about how the app works, I don't think we'd object to that, but individual's use of apps, I don't see the relevance of that at all.

THE COURT: I think an individual may know or have a

belief as to whether the app he or she was using was encrypted, whatever that means.

MR. RICHENTHAL: Maybe. It begins to seem like expert testimony to me. Again, we are calling a technical expert. I don't think there will be any dispute what apps are and are not encrypted. What I'm resisting is the idea that lay witnesses should be cross-examined as to what apps they use.

MR. FEE: The point, your Honor, is different than that. I don't want to ask anybody technical questions. I believe the argument the government will make is the fact that facially innocent messages like, "hey, I'll see you there; I'll meet you at the cafe," were sent on an encrypting messaging app by itself supports the inference that these were communications in furtherance of a crime.

I would submit and believe that everyone at that table and almost every witness they call has these same apps on their phone and uses them. So that would be the sort of questioning we would be obliged to do with limited --

THE COURT: I don't think I need to rule on it at this point.

MR. FEE: I agree, sir. Thank you, your Honor.

THE COURT: Number three, this is by Menendez to preclude speculative testimony regarding the reasons the Qatari Investment Co. invested in Daibes owned -- in real estate projects that Daibes owned. I'm not sure what this motion is.

Clearly, the reasons why the Qatari Investment Company invested in the owned real estate is relevant here. I think the motion is to preclude inadmissible evidence. If that's the motion, that motion would be granted for everything. Inadmissible evidence can't come in. So what's that motion?

MR. FEE: Your Honor, I don't know if I need to formally withdraw this -- this was before we saw the 3500 and realized that witnesses were saying the opposite from Heritage, the Qatari Investment Company that was not connected. So I have nothing further to say about your Honor's observation. Thank you.

THE COURT: Fine. Now, that makes me think about the pending Rule 15 motion which I'm working on. I'm not inclined to grant it. I need to think more about it. But it seems to me that to the extent what's at issue is the four bullet points set forth in the Menendez motion -- do you know the bullet points I'm talking about -- that could be the subject of stipulation by the parties, obviating the need for the Rule 15 element, although the exact words of those bullet points I would assume are not acceptable to the government, but it does seem to me a fair ground for the parties to resolve that by way of stipulation.

Government?

MR. RICHENTHAL: We're certainly open in good faith considering any stipulation. I will say our view of the bullet

points if your Honor is referring to document 360 at page two is that they're not factually accurate and not what the witnesses we believe would say. But we're certainly open to considering in good faith anything the defense presents.

Frankly, even if we think it's inadmissible, we'll gladly sign the stipulation and argue about it -- that's been our position since the beginning.

MR. FEE: You heard him agree to admit inadmissible evidence, your Honor. But yes, we're open to a stipulation.

THE COURT: All right. But do that --

MR. FEE: Fast.

THE COURT: Focus on that now. That's right, because the parties deserve a position on the Rule 15.

MR. FEE: Yes, sir.

THE COURT: The very late Rule 15 which the defendants have said the parties will oppose the motion. If you can resolve it by stipulation, do so.

Next one. Request by Menendez to preclude testimony regarding why IS EG Halal received the contracts from the Egyptian Government. I mean, certainly why is relevant. The parties seem to disagree as to whether or not they have admissible evidence. All I can tell you is I'm not going to admit speculation, but if there are text messages that fall within the Rules of Evidence, it seems to me it comes in, it's relevant. What's the issue here? I don't see an issue.

MR. FEE: Your Honor, you're right you can rule on this as it comes. We have seen the 3500 --

THE COURT: The ruling would be on the basis of the Rules of Evidence.

MR. FEE: Understood.

THE COURT: What I'm saying is the subject is relevant under 401 and 402, and I don't see a Rule 403 issue.

MR. FEE: Agreed. The 403 issue has really become a 401 issue as well. We have seen evidence and witness interviews of USDA officials guessing at the reasons why IS EG Halal got this contract.

THE COURT: Guesses aren't permitted.

MR. FEE: I understand, your Honor. Just flagging it might be in some of the text messages the government may offer, emails, and the like.

THE COURT: All right. That's ECF 290.

Let's go to ECF 292, which is Menendez's three motions in limine to exclude evidence and testimony regarding campaign donations and Senate financial disclosure forms. The first one is to preclude evidence and testimony regarding campaign donations. I'm going to allow them in. It shows the development of the relationship of trust and confidence among the co-conspirators. I'm talking about it looks like fund-raisers' contributions from Uribe and Daibes.

The government isn't arguing it's part of the quid pro

quo, and the government I don't think can argue that. I'll give a limited instruction under 403 if the parties want, but under 403 there's certainly probative value substantially outweighs any danger or prejudice here, so it comes in to show the development of the relationship with trust and confidence among the co-conspirators.

Number two -- there's only two motions here. Number two is to preclude evidence and testimony regarding Senate financial disclosure forms. In the indictment it states that Menendez did not disclose their Mercedes, the cash, the gold, the Grand Prix tickets. That's paragraph 67. But he's not charged with a violation of Senate financial disclosure form rules. I'm going to allow it in. It's part of the crime itself. That is, his failure to disclose things of value received from co-conspirators seeking to issue officials acts. It's evidence of consciousness of guilt, and, as I say, it's an act in furtherance of the scheme.

There's no 403 issue here. It's highly probative of his consciousness of guilt. Again, if the parties want, I'll make it clear that he's not charged with violating Senate disclosure forms rules.

All right. That handle ECF 292. Let's go on to ECF 293. Menendez's motion to preclude the government's noticed 404(b) evidence. First motion under that, the government should be precluded from offering evidence of any prior

criminal charges. I've taken care of that. Dismissed as moot.

Second, the government should be precluded from offering evidence of Menendez's alleged financial needs. That's also raised by Mr. Hana in ECF 289. This goes to the financial circumstances and spending habits of Menendez and Hana.

My ruling is that it's inextricably intertwined with the evidence of the charged crimes. It goes to motive, knowledge, and intent under 404(b), and there's no 403 issue here. Now, meaning its probative value is not substantially outweighed by the danger of unfair prejudice. You're confusing the issues. The -- I'll start that again. Mr. Menendez's alleged desire for the car, the gold, and so forth, goes to motive, and the lifestyle that he had before and after is relevant here especially -- not especially, it's also relevant for Hana, that his life before getting the monopoly and after goes to his motive as well, his knowledge and intent.

So under 403, I am allowing evidence of -- here it's called lifestyle. I don't like that term -- but his spending habits and financial circumstances can be relevant and we'll get to that when we get to the expert witnesses. I'm still -- I'm getting a paper tomorrow on that, and then you'll have a decision shortly thereafter as to the financial expert.

That having been said, I'm certainly not going to allow things in like one case I saw there were hundreds of

photographs of assets. That's not what we're talking about. But to the extent it's relevant, what they were purchasing can come in, and that, as I say, goes for Mr. Hana on ECF 289, as well as Mr. Menendez on ECF 293.

Third motion on 293, the government should be precluded from offering evidence regarding omitting things of value on Menendez's tax returns. I am allowing that in. It's evidence of consciousness of guilt. There are lots and lots of cases on that. I'll give a limiting instruction if the parties want it to make sure the jury knows he's not charged with any tax fraud here, but under the 403 balancing test, I'm not going to exclude relevant evidence, because I find its probative value is not outweighed -- I'm sorry, its probative value is substantially outweighed by any risk of prejudice. So I'm allowing that in.

Number four, the government -- Menendez is saying the government should be precluded from offering evidence regarding Fusion Diagnostics, Inc. Now, Fusion is the company that paid Mrs. Menendez, and apparently there were household gifts and services rendered as well, or at least that's what the allegations are, in exchange for the Senator seeking to influence municipal officials to grant municipal contracts to Fusion and authorizations to do COVID-19 testing.

My conclusion is that's part and parcel of the charged offenses. It's relevant to motive and intent. It's relevant

to common scheme or plan, because the use of another entity, that is, IS EG Halal, in terms of the Egyptian issue, and the SIBC, Nadine's company, in terms of the Fusion issue, is the common scheme or plan. It also goes to absence of mistake or accident. So, again, I'll give a limiting instruction if the parties want, but I'm admitting it under 403.

Now let's go to Hana's motion in limine. I've already dealt with the --

MR. FEE: Your Honor, I'm sorry.

THE COURT: Yes, sir.

MR. FEE: On the Fusion ruling, well understood, just to flag, the defense may need to put on a witness or more depending how the government intends to prove those Fusion allegations, because there is significant *Brady* that I think is the reason why it wasn't charged and we think the jury would need to hear it, because essentially the government's description --

THE COURT: What do you mean? Be specific.

MR. FEE: I will, your Honor. They say the government's theory and the reason underlying the ruling based on the government's proffer is Senator Menendez made a call to a city official saying, "use this COVID testing firm, Fusion," and that there was some sort of pressure or influence. They spoke to those city officials, the government, and they denied that there was any influence. In fact, they said it didn't

matter whether or not Menendez called. We were letting anybody at that time show up and do our testing. So I don't know how the government plans to prove this, but we think to undermine the purposes for which you have admitted it, we would need to call at least that witness and perhaps others.

THE COURT: Government.

MR. RICHENTHAL: I think this depends on if the proof comes in. If it's admitted, for example, to show that Ms. Menendez's company was used a certain way that has no relationship whatsoever to whether state officials felt pressured by Mr. Menendez, I don't think it's right per your Honor's decision. We've heard your Honor's decision. We've heard Mr. Fee's remarks without commenting on the facts to which he alludes. Let's see how the evidence comes in.

THE COURT: Well, it strikes me that this is not a significant part of the government's case. You may avoid a problem, but obviously the government will put its proof on.

Okay. Hana's motions in limine. I handled the first one. Second one, you request the government to be precluded from introducing evidence that Hana was not registered as an agent of a foreign principal. He's not charged with not being registered. He's arguing it's irrelevant and prejudicial. It seems to me that that's right.

Let me hear the government. I mean, he's not being charged with failure to register. What's the relevance?

Government?

MR. RICHENTHAL: No, he's not, but our view is it goes to at least two things: First, it goes to his consciousness of guilt, that is, desire to conceal the actions he's undertaking as an intermediary between the Egyptian Government and Mr. Menendez.

THE COURT: That assumes he's required to be an agent.

MR. RICHENTHAL: Not necessarily. It assumes he may believe he's required to be an agent. What's in his head, rather than that the proof --

THE COURT: Fair enough.

MR. RICHENTHAL: Second, part of what's going to happen in this case, we believe -- that's what we anticipate we'll see is the jury needs to understand the distinction, as is relevant here with respect to Egypt and -- between registered kind of overt lobbyists, for lack of a better phrase, and for lack of a better phrase again, sort of secret quasi-lobbyists.

THE COURT: I understand that.

MR. RICHENTHAL: And for the jury to understand that, our view is they need to understand there is a public database with respect to those registered under FARA and a public database with respect to those registered under the Lobbying Disclosure Act, that, in fact, there were lobbyists for Egypt at the contemporaneous time, and that the people that Mr.

Menendez was liaising with, giving information through and getting directions from were not those people.

To place that in front of the jury we think the jury needs to understand in general, not terribly detailed, the regime I just described, but the people --

THE COURT: But nobody's disagreeing with that. Go ahead.

MR. RICHENTHAL: But one of the people I just mentioned, that is, that I call an intermediary, is Mr. Hana.

THE COURT: Right.

MR. RICHENTHAL: So the jury would have to know Mr. Hana does not appear in those databases, that he was not a registered lobbyist.

THE COURT: You can adduce that. Go ahead.

MR. RICHENTHAL: And he was not a registered agent.

THE COURT: You can adduce, I mean, whatever those forms show. Go ahead.

MR. RICHENTHAL: If we can adduce that Mr. Hana, as relevant to this motion, was not a registered agent or lobbyist, then I think your Honor, and maybe I'm misunderstanding, has actually denied Mr. Hana's motion. That is what we intend to adduce. We're not going to prove he had to register. We would like to prove he did not register. That is, he did not appear in his --

THE COURT: You can -- Mr. Fee, it seems to me the

government can --

MR. FEE: It's the better one, your Honor.

MR. LUSTBERG: This is mine.

THE COURT: Oh, yes. Sorry.

MR. LUSTBERG: But maybe he'll have a better answer.

THE COURT: Mr. Lustberg.

MR. LUSTBERG: Yes.

THE COURT: It seems to me the government should be able to produce lists of registered agents, and if Hana isn't on it, Hana isn't on it.

MR. LUSTBERG: Your Honor, the key and I think we're starting to reach an agreement here, is that they can't argue that he should have registered. If they want to point out that he did not register, that's much less prejudicial.

THE COURT: I think everyone understands.

Yes. Government.

MR. RICHENTHAL: Yes. He's not charged with that offense. We're not going to argue he committed that offense. Absolutely.

THE COURT: All right.

MR. LUSTBERG: That's what we want.

THE COURT: Excellent. Thank you.

Those are the in limines, and you have my statement on the stipulation for the Rule 15. Let's handle some other things.

I have the agreed statement of the case, which I'll read to the venire. I thank you for it.

I want an agreed upon jury verdict form, if the parties are able to agree upon a jury verdict form. I want it presented to me by Friday.

I want a list of witnesses from each side. I want it presented to me by Friday as well.

I want a list of attorneys, government agents, paralegals who will be sitting at counsel table for each party by Friday as well, because I'm going to read all that to the venire.

I want a list of places from each party. When I say each party, the defendants should submit one and the government can submit one.

List of places that I need to find out if the venire has had any particular involvement with. It's fairly standard.

The way I work, gentlemen and lady, is that on each witness, there's only one attorney, okay? I don't expect to be double teamed, and I don't expect every witness is double teamed. One attorney per party on each witness.

I expect evidentiary issues to be brought up before or after the jury leaves. I don't want to waste jury time with sidebars. So to the extent you know evidentiary issues will arise, and men and women of good faith will know in almost all instances that, bring it to my attention so that we're not

wasting jury time. I want an absolute minimum of sidebars. No sidebars are the best, but an absolute minimum.

If there's an objection to a question, normally I'll know what it is. Sometimes I'm not sure, I want to hear what the basis is, I'll say "basis." To the extent you can, give me one word, 403, 803(3), whatever it might be, because I don't want to take time to have a sidebar. Presumably the light will go off and I'll understand what the issue is.

I need the defendants to divide up cross-examination so that there's no substantive repetition. I shouldn't say substantive. So that there's no material repetition. In other words, Mr. Weitzman will handle one area of cross-examination. Mr. Lustberg another area. Mr. De Castro another area. Get together with that, so that we're not wasting everybody's time.

What's the estimate at this point, now that everything's been refined, where things have been refined, government, for the length of trial?

MR. MONTELEONI: Yes, your Honor. This is something we wanted to raise with you. Unfortunately, we're thinking the estimated length of trial is likely to be somewhat higher than we were hoping, possibly by one or two weeks, because although there has been progress with stipulations, there have still been no stipulations that have been signed, and a number of these authenticity stipulations could necessitate calling a number of custodians.

I will say --

THE COURT: There should be no authenticity issues unless there's a genuine authenticity issue. Parties should be able to resolve authenticity issues by stipulation.

MR. MONTELEONI: Yes, your Honor. We --

THE COURT: Everybody will agree with that but that may not happen. I want it to happen.

MR. MONTELEONI: We do, too, and we've been working with defense counsel. We understand at least one defense counsel has a problem with some of the standard language in the stipulation about the stipulation itself being admissible, and so we're --

THE COURT: The stipulation of authenticity is always admissible. It says on it that you're admitting the stipulation and the underlying documents to which the stipulation of authenticity applies.

MR. MONTELEONI: I can't speak to why the defense counsel has developed this concern. Obviously, for authenticity, we're proposing stipulations for some documents that the defense is going to argue are not admissible, whether to knock out a need for a witness, if they're admissible on other grounds -- we think they want to change the language of the stipulation some way. They sent over a proposal to address this concern, which we've never really encountered as a concern before, last night and we're going to see if we can accommodate

it.

We don't think this should stand in the way, but to be clear, we've proposed -- starting April 24 we've proposed a long series of stipulations. They principally concern authenticity, and the ones that are outstanding are really about this and --

THE COURT: About authenticity.

MR. MONTELEONI: Yes. There are ones that they object to that are arguably more substantive that we understand, that's fine, we'll just call the witness, but there's a number of outstanding ones that absolutely go to authenticity, including, for example, a 33-page stipulation that recounts the authenticity of materials extracted from 31 different electronic accounts and devices, which we sent to them shortly after providing exhibits. We have heard some encouraging noises on that one, but they've asked for more information last night. We're going to provide it to them, but we don't know if it will satisfy them. We hope it does. If it doesn't, we're going to be offering evidence subject to connection and calling perhaps a large number of FBI custodians at the end of our case.

THE COURT: All right. All I can say now is let's avoid that to the extent possible. I'm not going to force an authenticity stipulation. If there are real issues of authenticity, somebody should call a witness, but normally

these are handled by authenticity.

There are going to be -- I mean, we're calling upon the good citizens of the State of New York to sit here for what was four to six weeks, and to the extent it's longer, it's going to be even more difficult to get people, and that's a concern. I've called in a panel on the basis of four to six weeks.

You have my views. Unless there's a serious issue of authenticity, it should be stipulated to. It's not addressed to you. It's addressed to the lawyers.

Mr. Fee.

MR. FEE: Your Honor, just to be --

THE COURT: I assume you don't disagree with what I have said.

MR. FEE: Well, I disagree -- this was an awfully abridged summary. We have no problems with authenticity stips. You just heard him refer to a 33-page stip. It's a fact stip, your Honor. It described how they extracted evidence. We have no issue with authenticity stips. Every single one of the stipulations proposed to us contain things well beyond authenticity, and a number of errors. There's 42 of them. I think we've gotten back to them --

THE COURT: Forty-two what?

MR. FEE: Stipulations. We've gotten back to them with nearly half. We're dealing with all this at the same time

as trial preparation. We are working very hard, your Honor. I don't think there's going to be any authenticity dispute at all.

THE COURT: All right.

MR. MONTELEONI: Your Honor, may I just add one thing?

THE COURT: Yes.

MR. MONTELEONI: We have been working with them, and I'm not -- I mean, I am hopeful that we will reach these agreements. There have been some positions that they've taken where -- for some documents, where we are calling a witness they don't want to stipulate to the authenticity of the document, because they're going to want us to actually ask the witness about it on the stand even if we otherwise wouldn't have done that. We're trying to work through that. It's potentially going to be, again, something where we'll have to introduce evidence subject to connection and potentially ask witnesses more questions than we would need to before the jury.

We're going to try. We certainly are trying in good faith.

THE COURT: All right. Do so.

MR. FEE: I'm sorry, your Honor. What was the estimate they offered?

THE COURT: Four to six.

MR. FEE: Four to six. Okay.

MR. MONTELEONI: Yes, if the stipulations are worked

out, then that's our view.

THE COURT: Okay. Well, I'm going to give an honest estimate to the panel, so you'll let me know.

MR. MONTELEONI: I think at this point we should have to say five to seven or potentially more. If we have a lot of signatures in the next few days, then maybe we can revise that back down.

THE COURT: That may need a bigger panel. I would hate to run out of venire men and women and have to call in a second panel, which would itself delay things.

All right. We'll take it as it comes. Try to work out those stipulations so that I can say in good faith four to six weeks. I'll add, one never knows with trials. It could be shorter. It could be longer. But I do need to give them a good faith basis for an estimate.

Sir.

MR. FEE: Just for accuracy, your Honor, I assume that's the government's estimate. We would estimate one to two weeks for the defendants' case.

THE COURT: All right. I intend to, especially in light of this discussion, impanel six alternates. Now, my reading of Rule 24 is as follows: Twelve seated jurors, six seated alternates, six government peremptory challenges, ten defense challenge. You'll share the challenges amongst the defense. When six alternates are chosen, the government gets

three additional peremptory challenges, and the defense gets three additional peremptory challenges. That's 24(c)(4)(C). That's a total of 40 jurors, as I read it. If anyone interprets Rule 24 differently, let me know.

That means, out of the array that I'm calling in, we can't start picking until we have 40 jurors who are not disqualified or excused. Be aware of that at all times.

Who's doing the opening for the government, and how long is the estimate? I don't demand that you stick to a time estimate, but I want a good faith basis.

MR. LUSTBERG: Judge, just before you get to that, let me make this application, as I've typically done and I think others have in cases of this magnitude, that the Court expand the ten and six from Rule 24 to 12, just giving two more peremptories to the defense so that each of us gets four, since there are three of us, and then the government could get one or two more, too, if they wish to even it up. It would only add a few more jurors but allow us sufficient peremptories among each of the three of us for that protection to be meaningful.

THE COURT: I see no need for that. You've been working cooperatively up to now.

MR. LUSTBERG: Judge, along those lines, working cooperatively, this is a conspiracy case, and we would ask the Court, as things proceed, to be able to consult among ourselves with respect to jury strikes not in front of the jury panel.

THE COURT: Yes.

MR. LUSTBERG: Okay. Thank you.

THE COURT: Is the application for you to talk amongst yourselves?

MR. LUSTBERG: Talk amongst ourselves without the jury watching that interaction.

THE COURT: Oh, no. I understand that. Yes, of course.

Who's doing the opening for the government and how long is the estimate?

MR. MONTELEONI: Lara Pomerantz will be giving the government's opening, and the opening will be no more than 45 minutes.

THE COURT: Defense, who's doing it, and in what order and how long?

MR. WEITZMAN: Your Honor, I will be delivering the defendant's opening on behalf of Senator Menendez. I expect to be about an hour.

THE COURT: You're first up? The defense have decided that?

MR. WEITZMAN: We haven't discussed it.

THE COURT: All right. You'll let me know.

MR. WEITZMAN: Yes.

THE COURT: Right now Mr. Weitzman is first up.

MR. LUSTBERG: Your Honor, I will be doing the defense

opening for Mr. Hana, and we expect it to be a half hour.

MR. DE CASTRO: Hi. For Mr. Daibes, Mr. De Castro will do it, and I'm thinking 20 minutes, 20 to 30.

THE COURT: Here's how I intend to pick this jury. I can fit 102 members of the venire here. It's considerably more than I normally do, but it will help cut down repetitive questioning. That's 18 in this group. That's six rows of eight each on the right, and six rows of six each on the right. That means that people who are not involved in trial will be in the back row. All the others will be at the beginning at least occupied by members of the venire.

One of the -- I'll explain, I'll read the agreed upon statement and explain some basic things, and at some point very close in I will ask that those who cannot sit for whatever time I feel is appropriate, either four to six weeks, or five to seven weeks, for a substantial reason, to raise their hands. At that point, I'll ask those who have not raised their hands, in other words, who can sit for the appointed time, to go to another courtroom that we have. That's so they don't have to sit here while I question each and every juror who feels he or she cannot sit.

So they'll go to another courtroom and we'll have a CSO or -- probably CSO there. Then I will go one by one and find out what the reasons are that they can't sit. That will take a considerable period of time. I then will excuse those

who I feel cannot sit. I'll ask the parties if they have any additional people that they want me to excuse.

To make it simple, when everyone comes in, my deputy will read their names out, and they'll sit in order. And we have index cards with a number, so from then on I'll refer to them by the number. It just makes it a lot easier. And they'll hold up the number, so they don't have to be concerned about remembering.

My clerks will try to make sure that the people sit in the number in which they're called, because sometimes if somebody's close in, they may sit before the person with the lower number. But we'll get it straight or we'll certainly try to. I'll refer to everybody by their numbers.

After those who cannot sit for the period of time of the trial are excused, we'll bring the other people back, and I'll do the general questioning. Then at some point I will do the individual questioning.

At the end, I'll ask if the parties -- we'll go to sidebar. I'll ask if the parties have any additional questions that they feel I should be asking or any follow-up and we'll handle it that way. I'll give the parties time to order their pre-empts outside the hearing of the jury, and then we'll go to sidebar and we'll pick the jury.

Normally I can do that around lunchtime, either before or after lunch. I think this is going to probably take a day,

if not more. I mean, that's my estimate. We'll see. You should be prepared for your openings on Monday, but I don't know if we can get to it. That's mechanically how I intend to do it.

Are the parties working on the stipulations that were discussed in regard to the classified information?

MR. RICHENTHAL: They've been signed, your Honor.

THE COURT: Each. Each of the two.

MR. RICHENTHAL: Mr. Mark can provide more detail. One has been signed. One we anticipate being signed soon. If the Court would like more information --

THE COURT: No. That's accurate. Get those to me.

MR. RICHENTHAL: We don't anticipate that being an issue, your Honor. The parties work together well.

THE COURT: Okay. That's everything I have.

Is there anything anyone else has?

MR. MONTELEONI: Yes, your Honor. We've been engaging with defense on several issues. We've not really been able to reach agreement on some matters, such as when parties are going to exchange opening slides. We think it would be helpful if anyone who is using a visual in their openings would exchange them a day in advance or --

THE COURT: I'm sorry. I thought I had addressed that the last time. If you're using demonstratives, yes, I want the other side to have them in advance, not that morning.

MR. MONTELEONI: Thank you, your Honor.

THE COURT: I want everybody to go to Mother's Day celebrations as well to the extent possible.

MR. MONTELEONI: Thank you.

One or two other things. We've, on several occasions, raised with the defense providing copies of the materials that they've obtained through their subpoenas. We've done this for months. We've recently understood that some witnesses have actually gotten subpoenas and produced materials that we have not gotten from the defense. We don't understand why that's the case. And in one case, it was a production from a subpoena, and in another case, it was a subpoena to the Senate. The subpoena was withdrawn and the documents were provided voluntarily, but we think that that also counts as related to the subpoena and we would request that they be provided.

And in the context of Senate documents in particular, those can be very relevant to an issue that we raised in connection with the notice issue, which is the possibility of waiver of speech or debate protections, which we want to be very clear we think it's very possible that defense counsel will introduce evidence of the Senator's legislative acts, and if he does so, we anticipate --

THE COURT: He votes -- for example, votes, and speeches on the floor, is that what you're talking about?

MR. MONTELEONI: Well, yes, but also the Court ruled

that holds and the lifting of holds with respect to FMS and FMF, the military aid we described in the indictment, were also legislative acts. We think it's very possible that the Senator will be intending to introduce evidence of that, and we want to be very clear that if that happens, we intend to seek permission to ourselves offer evidence of the subjects of his conduct with respect to holds, with respect to lifting of holds and the like, because that is a waiver for all the reasons that we put forth in our notice letter.

But, regardless, even beyond that, which hasn't arrived yet, we still don't have these subpoena returns that the defense has been collecting and has not provided to us.

THE COURT: The agreement of the parties is to provide the subpoena returns?

MR. MONTELEONI: We haven't really gotten an agreement from the defense, but we've been -- oh, sorry, there's also been a -- I should say that there's also been an order that the Court issued for defense exhibits, and only one defendant has identified their exhibits by the April 26 deadline. The other two, they haven't identified anything by the deadline, and they haven't identified anything after either.

I understand if -- you know, they're saying, well, they're -- you know, they're dealing with a volume of material that we provided, but really the deadline was April 26 and we haven't gotten anything. So we would ask that the defense, in

fact, designate to us their exhibits, so that we can prepare for trial and produce the materials that they've obtained in response to their subpoenas.

THE COURT: Mr. Fee.

MR. FEE: I have a solution, your Honor. If we were told the witnesses they expect to call in the next two weeks, it sure would help us focus on what amongst the 50 witnesses on the witness list and the 10,000 exhibits that might be coming in through those witnesses, and then we can figure out what non-impeachment exhibits we might have. Frankly, I don't think there's very many, but that would be really helpful, your Honor.

MR. MONTELEONI: Your Honor, the April 26 deadline was set for the defense's case, not for the first two weeks of the defense's cases.

THE COURT: Yes.

MR. MONTELEONI: And Rule 17 requires them to be providing these materials, and we don't understand why we even have to raise this, why they're not just complying with that.

MR. FEE: That order didn't apply to the defense's case, your Honor. Your Honor, as a practical matter, we can only identify the things we have identified. We're working through a ton of stuff. We have disclosed what are the exhibits we intend to submit now.

Your Honor, this is not an argument. There's a

50-witness list. We don't even know, most of those witnesses, what they will testify about, because they're just FBI witnesses. So we are doing the best we can. I would ask -- I think this is something we need to address, of greater importance, the government needs to identify the witnesses it intends to call at some point before the trial starts, because it will be a mess if -- we would like to get them on the Friday before. Here are the witnesses we expect to call this week. Obviously they can make adjustments. Here are the witnesses we expect we'll call on Monday and Tuesday. We'll update you on the sequence the rest of the week, and so on throughout this trial.

THE COURT: This all ought to be done by agreement.

MR. FEE: I agree, your Honor.

THE COURT: Government, they're entitled to some advance notice of who the witnesses are going to be.

MR. MONTELEONI: Absolutely, and we've been negotiating. We've sent forth a proposal. We sent them a proposal earlier -- I'm sorry, last week now. A few days ago on May 1st was the most recent version. We haven't heard back from them. We think that the Friday before, a whole week, is -- that's really not very realistic with the logistics of how the trial works and what we're arranging.

We certainly are intending to tell them as we get close to the witnesses who is coming up. We want to tee up any

evidentiary issues, also. So we have a proposal. They've I think just, you know -- they have a different view.

THE COURT: What's the proposal?

MR. MONTELEONI: Well, our proposal is we will let them know at the end of the trial day the witnesses -- yes.

MR. FEE: The night before, your Honor.

MR. MONTELEONI: The next witnesses anticipated in order, and the exhibits that we expect to be introduced by 7:00 PM.

THE COURT: So what -- the witnesses for what, the next day?

MR. MONTELEONI: For the next day.

MR. FEE: It will be a train wreck, your Honor.

MR. MONTELEONI: Your Honor, I also would say we also do intend to work in good faith to provide them with information earlier, but we don't like the idea of a requirement that we are going to held to have violated if -- because things change all the time, especially some witnesses are coming from out of the country and we have multiple different crosses, the length of which is going to be very difficult to anticipate.

So, you know, we are open to doing somewhat more in advance of this -- we've also I can say, as the Court knows, shared draft summary charts now almost two weeks in advance of trial, which covers a very large portion of our exhibits. So

we're not trying to hide the ball here. We're just trying to avoid a commitment that's not going to be very realistic for how trial progression is going to progress.

THE COURT: Normally, again, these are things that the parties handle themselves. I understand that there are issues, and you should let them know if there are issues, if this person is coming from abroad and so forth. Give them two days at a minimum of witnesses, all right, with the relevant proviso, to the extent you can do more that will engender good will on the part of the other side, okay, but let's not be too -- give them a couple of days.

MR. FEE: Your Honor, I would ask to make that a longer period. They are going to hold us to that two days. They are telling witnesses now when they're going to show up. We can see it in the 3500. We've all tried long cases in this district. Two days in a case of this length will make your job and the jury's experience much, much worse.

We are not going to say, oh, Mr. Monteleoni, you didn't tell us about this witness, preclude. We understand things happen. We're all trial lawyers. Two days is not enough.

THE COURT: Right now two days. We'll see if it's not enough. I need the parties to start working together.

MR. MONTELEONI: Thank you, your Honor. But we still have not received their subpoena responses and our --

MR. FEE: They don't get our subpoena --

THE COURT: Let him finish.

MR. FEE: Sorry, your Honor.

MR. MONTELEONI: These are materials that are called for by Rule 17. We haven't gotten them. We request they be directed to provide them to us.

MR. FEE: Your Honor, we'll comply with the Rule 17 obligation. They don't get everything we get in response to a subpoena. We're working on it, your Honor. There's a lot going on.

THE COURT: Well, there's a lot going on for everybody. Do it.

MR. FEE: Thank you, your Honor.

THE COURT: Anything else?

MR. MONTELEONI: This doesn't require immediate action, but as regards how the trial examination is going to proceed, we should note that a number of our witnesses, as you'll see on Friday when we submit the lists, are identified with an adverse party, either because they have employment relationships with the defendants or they are I guess in this case former counsel for the defendants, so there may be examination by leading questions under Rule 611 as a result of that.

THE COURT: You're telling me --

MR. MONTELEONI: Letting you know it's going to be a

little unusual.

THE COURT: You're telling me that you will be calling adverse witnesses.

MR. MONTELEONI: Yes. A number of our witnesses will be adverse.

THE COURT: I understand what the rules are.

MR. FEE: Two quick points, your Honor. The list of witnesses I believe was the word you used, obviously, for the defense, we're not required to list those witnesses. We don't know who the witnesses are going to be.

THE COURT: Exhibits --

MR. FEE: Lists of name and places for the disclosure in trial, a list of names and places that are likely to come up at trial.

THE COURT: That's what I started with, yes.

MR. FEE: Got it. Second, your Honor, I don't think this is an issue -- we are submitting a short reply on the Rule 15 briefing today, and I'd ask you to hold off on ruling until you have a chance to read that reply.

THE COURT: Well, you heard I want the parties to be able to stipulate --

MR. FEE: I agree, your Honor. We're working on that.

THE COURT: I'm not going to decide it today.

MR. FEE: Thank you, your Honor.

THE COURT: All right.

MR. MONTELEONI: One thing, I'm not sure I totally understood what Mr. Fee said. We do need the names for voir dire of people they might call, whether or not they are going to call them.

THE COURT: Yes. Absolutely. I don't want somebody showing up as a witness who wasn't on that list of possible witnesses absent something extraordinary.

MR. FEE: That's right, your Honor.

THE COURT: Thank you all. I appreciate it.

MR. FEE: Thank you, your Honor.

(Adjourned)